

STATE OF MICHIGAN
COURT OF APPEALS

EDITH ELLEN PETTIS,

Plaintiff-Appellant,

v

RIETH-RILEY CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED

March 20, 2003

No. 234341

Kent Circuit Court

LC No. 98-011714-NZ

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant \$22,093.53 in attorney fees, and \$1,739.22 in other costs, for a total of \$23,832.75. We affirm.

The underlying case involved a trespass claim by plaintiff and quiet title claims by both parties. In dispute was a twenty-eight-foot wide strip of land along the boundary that separated parcels owned by the respective parties.

Plaintiff contends that the trial court erred when it found that plaintiff's case, which had been disposed of by the grant of summary disposition in favor of defendant, was filed in violation of MCR 2.114(D)(2) and was frivolous. We disagree. We review a trial court's finding as to whether an action was frivolous for clear legal error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). We also review a trial court's decision regarding whether a party or attorney has violated the signature requirements of MCR 2.114(D) for clear error. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 91; 592 NW2d 112 (1999) (citing *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990)).

A trial court has the authority to sanction a party pursuant to MCR 2.114 and MCL 600.2591. MCR 2.114(D) states:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted

by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If the person who signs the document, or the party that person represents, submits a document for one of these improper purposes, then the trial court shall impose, even on its own initiative, an “appropriate sanction.” MCR 2.114(E).

MCR 2.114(F) states that a party pleading a frivolous claim is subject to costs as provided in MCR 2.625(A)(2). MCR 2.625(A)(2) provides that “if the trial court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided in MCL 600.2591.”

A claim is frivolous when at least one of the following conditions is met:

(i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.

(iii) The party’s legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

In the present case, only subsections (ii) and (iii) are implicated.

The trial court stated:

The dismissal of the case was based on the unmistakable meaning and legal import of an affidavit duly recorded by plaintiff’s father back in 1956, an affidavit which she and her counsel were fully aware prior to filing this case. The unmistakable legal effect of that affidavit and plaintiff’s knowledge of it combine to compel the conclusion that filing this case was in such blatant violation of MCR 2.114(D)(2) that it constituted both a violation of that subrule and a frivolous action.

The recorded affidavit of plaintiff’s father states:

GLENN W. PETTIS, being first duly sworn, deposes and says that he and his brother Eugene H. Pettis, of Ada, Michigan are the owners of a parcel of real estate in the Township of Ada, Kent County, Michigan, lying West of a line described as the North and South line 730 feet West of the East line of Government Lots One (1) and Two (2) of Section 20, Town 7 North, Range 10 West and that Lucille Knutson, as the survivor of herself and Kenneth Knutson, of 1023 Pettis Avenue N.E., Ada, Michigan, is the owner of lands located in Section 20 of Town 7 North, Range 10 West and said lands lie immediately adjacent to and joining deponent’s land on the East.

Based on the language of this affidavit, it is clear that the signers of the affidavit were stating that the strip of land now in dispute was part of the parcel that defendant now owns. That conclusion was also supported by plaintiff's expert as well as her answers to interrogatories.

Plaintiff argues that the trial court clearly erred in holding that "the unmistakable legal effect" of the affidavit was defendant's ownership of the disputed parcel of property. According to plaintiff, over the years, the location of Government Lots 1 and 2 has changed, thus shifting the effect of some of the language in the affidavit. However, plaintiff waited until approximately seven months after the close of discovery to proffer any evidence that might have supported her argument on this point and the trial court properly exercised its discretion in refusing to re-open discovery or to consider the proffer. Further, the court properly held plaintiff to the deposition testimony of her expert and to her own admissions in interrogatories. As the trial court stated:

The flaw in that effort to avoid the rule about being bound by what you say in discovery is that, while the claim is made that we now know why they made mistakes, that claim isn't based upon evidence which is going to be submitted at trial in this case, given the scheduling order and limitations it imposed on disclosing a lot of this.

The trial court acknowledged that it could re-open discovery, but decided not to. The grant or denial of discovery is within the trial court's discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). We believe that the trial court did not abuse its discretion in refusing to accept evidence proffered seven months after the end of discovery. Based on admissible evidence presented to the trial court, the court concluded that plaintiff did not own and never did own the 28-foot parcel in dispute, and that plaintiff's claim was frivolous.

Plaintiff further argues that the trial court erred by not holding a hearing where plaintiff could explain the issues actually raised by the affidavit in light of the history of the referenced boundary line. Plaintiff cites *KLCO v Dynamic Training Corp*, 192 Mich App 39; 480 NW2d 596 (1991), where this Court stated that the "[a]nalysis of what process is due in a particular proceeding depends on the nature of the proceeding and the interest affected by it." *Id.*, 42 (citing *Artibee v Cheyboygan Circuit Judge*, 397 Mich 54; 243 NW2d 248 (1976); *Kennedy v Bd of State Canvassers*, 127 Mich App 493; 339 NW2d 477 [1983]). "Generally, due process in civil cases requires notice of the nature of the proceeding, *Van Slooten v Larsen*, 410 Mich 21; 299 NW2d 704 (1980), an opportunity to be heard in a meaningful time and manner, *Blue Cross & Blue Shield of Mich v Comm'r of Ins*, 155 Mich App 723; 400 NW2d 638 (1986), and an impartial decision maker, *Crampton v Dep't of State*, 395 Mich 347; 235 NW2d 352 (1975); *Harter v Swartz Creek (On Rehearing)*, 68 Mich App 403; 242 NW2d 792 (1976)." *KLCO, supra*, 42.

MCR 2.119(E)(3) provides that "[a] court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion." Plaintiff submitted a response to defendant's motion for partial summary disposition and appeared at the hearing on this motion. Both of these allowed plaintiff the opportunity to argue the merits of her claim. Defendant submitted a proposed order reflecting the trial court's opinion delivered from the bench at the hearing on defendant's motion. Plaintiff filed an objection on the ground that the trial court did not make a finding that plaintiff's

claim was frivolous. Defendant then moved for sanctions, and plaintiff filed a brief in opposition to this motion.

We conclude that the trial court did not err in granting defendant's motion for sanctions and awarding fees without having held an evidentiary hearing because the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) (citing *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 [1989]).

Plaintiff further argues that the trial court erred in concluding that the case was frivolous because both parties sought to quiet title to the property at issue. Plaintiff cites *Pettermann v Hill*, 125 Mich App 30, 33; 335 NW2d 710 (1983), and *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), cases that do not address the argument at hand. Rather, these cases address the reasonableness of attorney fees.

Plaintiff also cites an unpublished opinion from this Court. First, that case is not binding pursuant to MCR 7.215(C)(1). Further, that case also fails to address the argument at hand—that plaintiff's claim should not have been found to be frivolous because defendant filed a counterclaim to quiet title. Because plaintiff cites no binding authority in support of this particular argument, it is deemed abandoned. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002).

“A trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). Given the plain language of plaintiff's father's recorded affidavit, which is considered prima facie evidence of the facts pursuant to MCL 565.453, we are not left with a firm and definite conviction that the trial court clearly erred in granting defendant's motion for sanctions on the basis that plaintiff's case was filed in violation of MCR 2.114(D)(2) and was frivolous.

Plaintiff also contends that the trial court erred in assessing sanctions solely against plaintiff. Plaintiff concedes that this argument was not preserved. This Court need not review issues raised for the first time on appeal, although we may do so to prevent manifest injustice. *Herald Co, Inc v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

The trial court found that the case was filed in violation of MCR 2.114(D)(2) and was also frivolous pursuant to MCR 2.114(F). MCR 2.114(F) states that in addition to sanctions under this rule, a party pleading a frivolous claim is subject to costs as provided in MCR 2.625(A)(2), which states that costs shall be awarded as provided by MCL 600.2591.

MCL 600.2591(1) states:

Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

Based on the plain language of this statute, the trial court erred in imposing sanctions against only the plaintiff, rather than against plaintiff and her attorney who filed the action.

Plaintiff argues that the trial court's failure to follow a clear statutory mandate constitutes manifest injustice. In *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987), our Supreme Court, quoting *People v Farmer*, 380 Mich 198, 208; 156 NW2d 504 (1968), stated:

“While this Court does have inherent power to review even if error has not been saved – *People v Dorrikas* (1958), 354 Mich 303 [92 NW2d 305] – such inherent power is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial.”

In *Napier*, the Court concluded that “[m]ore than the fact of the loss of the money judgment of \$60,000 in this civil case is needed to show a miscarriage of justice or manifest injustice.” *Id.*, 234. We conclude that plaintiff has failed to demonstrate a manifest injustice under the standard provided in *Napier*. Therefore, although the court erred in imposing sanctions against only plaintiff, because there is no manifest injustice, this issue need not be reviewed and we decline to grant relief.

Defendant requested that plaintiff be sanctioned for filing a frivolous appeal. MCR 7.216(C) provides for such sanctions. This Court has imposed sanctions where the appeal is brought “without any reasonable basis for belief that there was a meritorious issue to be determined on appeal.” *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996), quoting MCR 7.216(C)(1)(a). Although some of plaintiff's arguments did not have any merit, we believe that there was a reasonable basis for belief that plaintiff's argument concerning the sanctions against plaintiff only was a meritorious issue to be determined on appeal. Therefore, we conclude that defendant should not be awarded sanctions.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder